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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ROSA GARCIA et al., Plaintiffs and Respondents, v. FRANCIS G. D'AMBROSIO et al., Defendants and Appellants.	B164041 (Los Angeles County Super. Ct. No. BC 274657)

APPEAL from an order of the Superior Court of Los Angeles County. Mary Ann Murphy, Judge. Affirmed.

Bonne, Bridges, Mueller, O'Keefe & Nichols, Mark B. Connely, Patricia Egan Daehnke, William R. Johnson and Vangi M. Johnson for Defendant and Appellant Francis G. D'Ambrosio.

Riley & Reiner, Ira Reiner, Raymond L. Riley, Douglas D. Winter and Scott M. Radin for Defendants and Appellants Francis G. D'Ambrosio and Premier Medical Management Systems, Inc.

McGregor & Mosier, Robert A. Mosier and Holly H. McGregor for Plaintiffs and Respondents.

Francis D'Ambrosio, M.D., appeals from the trial court's December 20, 2002, denial of his motion to compel arbitration in this medical malpractice case filed by the widow and now adult children of decedent Juan Garcia (collectively, Garcia). We affirm.

BACKGROUND

Garcia's first amended complaint seeks damages for medical malpractice, battery, fraud, breach of fiduciary duty, negligence, wrongful death, and loss of consortium arising from the death of Juan following back surgery performed by D'Ambrosio.[1] The complaint alleges that Juan suffered an on-the-job back injury in February 1999 and because of his long-standing liver disease and hematological problems, was not a surgical candidate. The alleged probable outcome of surgery on him was death. Accordingly, Juan's medical treatment had been conservative and non-surgical.

According to the complaint, D'Ambrosio began treating Juan in November 2000. D'Ambrosio, who had previously practiced in Nevada, had given up his Nevada license, allegedly in the face of charges of repeated malpractice. Garcia alleges that, although aware of Juan's medical problems and that he was not a surgical candidate, D'Ambrosio proceeded with surgery without performing appropriate pre-surgery studies or obtaining clearance from Juan's hematologist. The surgery was performed in May 2001. Juan died shortly thereafter of hematological and liver complications caused by the surgery.

Juan apparently had signed a two-paragraph "Treatment and Arbitration Agreement" bearing D'Ambrosio's letterhead on November 1, 2001. In October 2002, D'Ambrosio filed a motion to compel arbitration, which the court denied without

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[1] The complaint also names as defendants Premier Medical Group, Bellflower Medical Center, and Robert Schatz, M.D.

prejudice on November 15. On December 20, the trial court treated D'Ambrosio's motion for reconsideration as a renewed motion to compel and again denied the motion. D'Ambrosio filed a notice of appeal.

DISCUSSION

D'Ambrosio claims he was not required to sign the agreement and the lack of his signature does not invalidate the agreement. Because this matter concerns contractual interpretation, our review is de novo. Interpretation of an arbitration agreement itself on the issue whether it applies to the controversy is a question of law, subject to an independent judgment review, if no conflicting extrinsic evidence on the issue of interpretation was introduced in the trial court. (*Maggio v. Windward Capital Management Co*. (2000) 80 Cal.App.4th 1210, 1214.)

The agreement provided, "By our signature, we consent to this agreement and each acknowledges receipt of a true copy thereof." Neither D'Ambrosio nor anyone on his behalf signed the agreement.

D'Ambrosio says he was not required to sign the agreement, citing *Grubb & Ellis Co. v. Bello* (1993) 19 Cal.App.4th 231 (*Bello*). *Bello*, which addressed the issue as one of mutuality of remedy rather than mutuality of obligation, held that an arbitration provision may be enforced against a party even if the other party did not initial the arbitration provisions, adding, "Nothing in established contract law proscribes a contract provision from subjecting only one party to arbitration." (*Id*. at p. 239.) From this, D'Ambrosio concludes that because the party resisting arbitration -- Garcia -- signed the contract, the arbitration provision is enforceable.

D'Ambrosio also cites *Basura v. U.S. Home Corp*. (2002) 98 Cal.App.4th 1205, 1215-1216, in which the court held that the failure of one party to initial an arbitration provision in a form, residential purchase contract invalidates the agreement to arbitrate only when by its terms the agreement is only enforceable if signed by all parties. Otherwise, says D'Ambrosio, the agreement is enforceable where there is an intent by

the non-signatory to perform. D'Ambrosio says his intent to agree to arbitration was demonstrated by his petition to enforce the agreement. This latter statement is facile, but not compelling. D'Ambrosio's failure to sign allowed him to reserve to himself the right to choose whatever course benefited him at a particular time, depending on the potential benefit/harm to him. It tells us nothing about whether he intended to perform under the agreement as of the time he asked Juan to sign and Juan signed the agreement. However, "[a] court's paramount objective in construing [a contract] is the parties' objective intent when they entered into it. [Citations.]" *Sy First Family Ltd. Partnership v. Cheung* (1999) 70 Cal.App.4th 1334, 1341; Civ. Code, § 1636.)

D'Ambrosio also points out that the trial court made no findings that his failure to sign the agreement rendered the agreement unenforceable, and, as a result, Garcia's failure to cross-appeal constitutes a waiver of this issue. D'Ambrosio provides no authority supporting his assertion that Garcia, who prevailed on the motion, was required to cross appeal. (See Code Civ. Proc., § 902 ["Any party aggrieved may appeal . . . ."].) A party is legally aggrieved only if his "rights or interests are injuriously affected by the judgment." (*County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 737.) D'Ambrosio does not contend Garcia was legally aggrieved by the trial court's ruling, nor does he suggest that a so-called protective appeal -- the need for which might arise if a trial court vacates a judgment or grants a new trial or judgment notwithstanding the verdict -- was called for in this matter.

As to D'Ambrosio's suggestion that the trial court's having denied his motion on grounds other than his failure to sign the agreement, an appellate court reviews a trial court's judgment or order, not its rationale, and upholds the ruling if it is correct on any basis, regardless of whether that basis was actually invoked. (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32; see also *Day v. Alta Bates Medical Center* (2002) 98 Cal.App.4th 243, 252, fn. 1.)

Turning to the agreement itself, the first paragraph addresses the medical services to be provided and doctor and patient obligations.[2] The second paragraph provides for arbitration and sets out the procedures to be followed.[3]

As noted, the last sentence of the agreement, which stands alone above the first signature line, reads, "By *our* signatures, we consent to this agreement and each acknowledges receipt of a true copy thereof." (Italics added.) The handwritten date of November 1, 2000, appears next to Juan's signature.

The issue thus presented is whether an agreement to arbitrate existed because D'Ambrosio never signed it, signifying a lack of mutual consent to arbitration. We find *Bello* of little help in resolving that issue. *Bello* has been much criticized and never followed. Instead, post-*Bello* decisions have agreed with the comment that "'to the extent [*Bello*] suggests mutuality of arbitral obligation is not required, we question the court's analysis of this issue, which has never been relied upon by other courts and is

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2 The first paragraph reads: "With regard to medical care and services provided or to be provided, IT IS AGREED THAT: THE ATTENDING PHYSICIAN will, to the best of his skill and knowledge, provide to the patient such medical care and services as are possible and practical in the light of circumstance. The PATIENT will cooperate fully with the ATTENDING PHYSICIAN by obtaining such medications as are prescribed, by following the instruction of the ATTENDING PHYSICIAN, by adhering to such treatment regimen or course of action as may be set forth, and by paying all fees and charges in full as billed or as provided by prior special arrangements. IT IS AGREED that: Because of differences in human constitution and response, it is in no way possible to warrant the outcome of such medical care and service."

3 The second paragraph reads: "In the event of any controversy between the PATIENT or a dependent (whether or not a minor) or the heirs-at-law or personal representative of a PATIENT, as the case my be, and the ATTENDING PHYSICIAN (including his agents and employees), involving a claim in tort or contractual, the same shall be submitted to arbitration. Within fifteen (15) days [there]after the PATIENT or ATTENDING PHYSICIAN shall give notice to the other of demanding arbitration of such controversy. The parties to the controversy shall each appoint an arbitrator and give notice of such appointment to the other. Within a reasonable amount of time after such notices have been given, the two arbitrators, so selected, shall select a neutral arbitrator and give notice of the selection thereof to the parties. The arbitrators shall hold a hearing within a reasonable time from the date of notice of selection of neutral arbitrator. All notices or other papers required to be served shall be served by United States mail. Except as provided herein, the arbitration shall be conducted in accordance with and governed by the provision of Title 9 of the California Code of Civil Procedure. The PATIENT may withdraw from the arbitration portion of this agreement within 30 days from the date of this agreement by notification of his intent to do so to the ATTENDING PHYSICIAN by registered mail."

hard to reconcile with other pertinent cases requiring mutuality of the arbitral obligation [Citations.]' [Citation.]" (*Marcus & Millichap Real Estate Investment Brokerage Co. v. Hock Investment Co*. (1998) 68 Cal.App.4th 83, 90-91 (hereafter *Marcus*.) We agree.

Marcus went on, however, to say it did not need to determine whether mutuality of arbitration is always required because, even if such mutuality is not generally required, "it is clear the terms of the [real estate] purchase agreement in this case contemplate that both buyer and seller must be bound before either is bound to arbitrate." (*Marcus*, *supra*, 68 Cal.App.4th at p. 91.) The court then reiterated that the arbitration clause to which only the purchasers had agreed by initialing stated, "'If a controversy arises with respect to the subject matter of this Purchase Agreement or the transaction contemplated herein . . . *Buyer, Seller and Agent agree* that such controversy shall be settled by final, binding arbitration.'" (*Ibid*.)

The *Marcus* court concluded, "Thus, even if we accept the *Bello* court's holding that [Code of Civil Procedure] section 1298[, subdivision] (c) does not impose a requirement of 'mutuality of *remedy*,' it does not follow that the notice provision required by that statute negates *a requirement of mutuality that the contract itself imposes*. [¶] In sum, we conclude that, read as a whole, the purchase agreement in this case contemplated that the arbitration of disputes provision would be effective only if both buyers and sellers assented to that provision. Since the sellers did not assent to this provision the parties did not agree to binding arbitration." (*Marcus, supra,* 68 Cal.App.4th at p. 91; italics added.)

In *Basura v. U.S. Home Corp., supra,* 98 Cal.App.4th 1205, the appellate court denied the motion of defendant U.S. Home Corporation, a seller of residential property, to compel arbitration of a design and construction defect lawsuit brought by 48 individuals who had bought homes directly from Home. Each form sales agreement contained an arbitration clause with spaces for initials by buyer and seller to make the clause part of the contract. It read, "'*By initialing in the space below you are agreeing* to have any dispute arising out of the matters included in the "arbitration of disputes"

provision decided by neutral arbitration as provided by California law and you are giving up any rights you might possess to have the dispute litigated in a court or jury trial.'" (*Id.* at p. 1209, fn. 3.) All 60 plaintiffs initialed the arbitration clauses; however, as to the 28 direct buyers, Home failed to initial the arbitration clause. The trial court denied Home's motion on the ground that there had been no agreement to arbitrate, citing *Marcus*.

The appellate court held that Code of Civil Procedure section 1298.7 was preempted by the Federal Arbitration Act (9 U.S.C. § 2) on the basis of numerous uncontroverted indicia that the court concluded demonstrated the home purchase contracts involved interstate commerce. (*Basura v. U.S. Home Corp., supra,* 98 Cal.App.4th at pp. 1214-1215.)

The court also held that Home's failure to initial the arbitration clauses in the 28 direct buyers' agreements was not dispositive. "On the threshold issue of whether the parties agreed to arbitrate a matter, courts apply ordinary state law principles that govern the formation of contracts, which principles are not preempted by the FAA. [Citations.] Therefore, we look to California law for guidance. [¶] 'When it is clear, both from a provision that the proposed written contact would become operative *only* when signed by the parties as well as from any other evidence presented by the parties that both parties contemplated that acceptance of the contract's terms would be signified by signing it, the failure to sign the agreement means no binding contract was created. [Citations.] This is so even though the party later sought to be bound by the agreement indicated a willingness to sign the agreement. [Citation.] On the other hand, if the respective parties orally agreed upon all of the terms and conditions of a proposed written agreement with the mutual intention that the oral agreement should thereupon become binding, the mere fact that a formal written agreement to the same effect has not yet been signed does not alter the binding validity of the oral agreement. [Citation.]' [Citation.]" (*Basura v. U.S. Home Corp*., *supra*, 98 Cal.App.4th at pp. 1215-1216.)

The court then concluded that "the lack of a perfected written arbitration agreement does not conclusively establish the absence of an agreement to arbitrate." (*Basura v. U.S. Home Corp*., *supra*, 98 Cal.App.4th at p. 1216.) The court reasoned that the 28 direct buyers "obviously intended to agree to arbitration" because they initialed the clauses in their contracts. "As for Home, in view of the fact it initialed the arbitration clauses in its contracts with [the 20 other plaintiffs], it reasonably may be inferred that Home intended to be bound by arbitration across the board and that its failure to initial the arbitration clauses in each and every contract was simply due to clerical error." (*Ibid*.) The court remanded the matter to the trial court to conduct an evidentiary hearing and make a factual determination concerning whether Home intended to be bound by arbitration, notwithstanding its failure to initial the arbitration clauses in the direct buyers' contracts.

The factual differences between *Basura* and the matter before us are obvious. Key differences are that the document before us involved only two parties, a two-paragraph agreement, and a failure to sign the agreement. Thus, D'Ambrosio's failure to sign cannot fairly be construed as a clerical oversight based on the number of parties and documents to be initialed. Nor does D'Ambrosio suggest otherwise. Unlike *Bello*, *Marcus*, and *Basura*, which involved failures to initial an arbitration provision of a multi-page document, D'Ambrosio did not sign the single-page agreement. Perhaps most critical is the language in the last sentence of the agreement: "By our signatures, we consent to this agreement . . . ." (D'Ambrosio does not, for example, claim there was an oral agreement.) The quoted statement, in a document bearing D'Ambrosio's letterhead, can only be fairly interpreted as intended to mean, in the words of *Basura*, that the entire agreement, including the arbitration provision, "would become operative only when signed by the parties." (*Basura v. U.S. Home Corp*., *supra*, 98 Cal.App.4th at p. 1215.)

In accordance with the *Marcus* reasoning, we hold that, read as a whole, the agreement in this case contemplated that the entire agreement, including the arbitration

of disputes provision would be effective only if both D'Ambrosio and Juan signed the agreement. Since D'Ambrosio did not sign the agreement, the parties did not agree to binding arbitration. Because we so hold, we do not reach D'Ambrosio's claim, including the material raised in his letter to us dated April 12, 2004, that enforcement of the arbitration provision is mandated by the FAA.

DISPOSITION

The order is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED.

ORTEGA, J.

We concur:

SPENCER, P.J.

VOGEL, J.